IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 718 OF 2004

Shri Sudam Ukha Khairnar ... Appellant
(Ori. Plaintiff)

V/s

1. Shri Mansaram Mahadu Bagul
(since deceased through his legal
heirs and representatives)
1-A. Smt. Shantabai Mansaram & ors. ... Respondents

Mr. Dilip Bodake for the appellant.

Mr. A.H. Palekar for Respondent No.3.

CORAM: P.V. KAKADE, J.

DATED: 23RD JUNE, 2005

P.C.:

1. This appeal has been preferred against the judgment and order passed by the Ad-hoc Addl. District Judge, Malegaon dated 27.1.2004 allowing the appeal and setting aside the judgment and decree passed by the Civil Judge, Jr.Divn., Satana dated 28.6.1999 decreeing the plaintiff's suit partly.

2. The plaintiff has filed the suit for declaration and injunction against the defendants. The plaintiff and

the defendants are the owners and in possession of the land block Nos. 27 & 28 respectively. There is a streamlet passing in North-South direction across the land of the plaintiff's block No.27. It was alleged that the defendants had encroached over the plaintiff's land upto the basin of the said streamlet to the extent of 65 Ares. Hence the plaintiff filed the suit for declaration of his ownership and possession of allegedly encroached area by the defendant No.1 and for order of permanent injunction.

3. The defendants challenged the suit on various grounds submitting that no encroachment has taken place and the streamlet which is in between his and plaintiff's land is the boundary and there is no question of any encroachment on his part. Alternatively, it was submitted that though encroachment is found to be made, then he had perfected his title by virtue of adverse possession. On such and other grounds, the suit was sought to be dismissed with costs.

4. The learned Trial Judge adjudicated the dispute on merits and came to the conclusion that the plaintiff had proved his case regarding ownership and possession of his land of Gat No.27 and further held that defendants

had illegaly cut-down trees from the suit land. On this basis the suit was partly decreed and perpetual injunction was granted against the defendants.

5. The appeal was carried to the District Court, Malegaon. The Ad-hoc Addl. District Judge, Malegaon adjudicated the appeal on merits and came to the conclusion that the evidence on record was not sufficient to support the findings recorded by the learned Trial Court and allowed the appeal setting aside the decree passed by the lower Court and dismissed the suit. Hence the present appeal.

6. I have heard the learned counsel for both parties. Perused the record.

7. At the outset, it may be noted that there is absolutely no substantial question of law involved in this appeal. The entire dispute is in relation to the land below the streamlet which evidently exists in between the lands Gat Nos. 27 and 28 owned by the plaintiff and defendants respectively. It is the case of the plaintiff that defendants had encroached upon his land of Gat No.27 and had cut the trees. However, in order to prove his claim, the cadestral surveyor’s

report and map drawn by him were produced in the lower Court in order to prove the alleged encroachment. However, as rightly pointed out by the learned lower Court Judge, the evidence of cadestral surveyor and the map prepared by him Exh.68 could not be relied upon as well as acted upon. It was held that defendants had proved their long standing possession on Western side of stream and to that extent the Trial Court has failed to have acknowledge while believing the evidence of cadestral surveyor on one issue and disbelieving it in respect of other issues. It was further held that the plaintiff failed to prove that the defendants had encroached on his land during pendency of the suit which was one of the allegation made by the plaintiff. Besides these aspects, even the perusal of the evidence of cadestral surveyor and map drawn by him Exh.68 could not be believed because a separate area of streamlet was not shown in the map land situated on both sides of the streamlet which would in fact in the nature of steep garden and steamlet was not shown in the map at all. If this was the position, then the learned appellate Court was right in discarding the evidence of cadestral surveyor and map. Once that map was discarded from the consideration, there was no evidence on record to substantiate the plaintiff’s claim. Therefore, in my

view, the lower appellate Court Judge has rightly appreciated the entire evidence on record. At one stage, the learned counsel for the appellant submitted that the defendants had taken the plea of ownership and title on the suit land by virtue of his adverse possession and, therefore, it amounts to admission from the defendants regarding ownership of the plaintiff over the suit land. However, this proposition cannot be accepted plainly due to the reason that the defendant had taken the plea of perfection of title of adverse possession only as defence by alternative prayer and, therefore, it cannot be held as an admission of the title over the suit property. Be that as it may, the fact remains that there is no substantial question of law involved in this appeal. The learned appellate Court Judge appears to have rightly dismissed the suit and, therefore, brooks no interference.

In the result, the appeal stands dismissed with no order as to costs.

(P.V. Kakade, J.)